Supreme Court, U.S.
FILED
OCT 4 1995
CLERK

CASE NO. 95-139

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

COOPER TIRE & RUBBER COMPANY,
Petitioner

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, RICHARD C. PILLSBURY, M.D., and ROBERT MAZA
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL T. McMENAMIN, Counsel of Record
for Petitioner Cooper Tire & Rubber Company
and NANCY A. NOALL
Walter & Haverfield, 1300 Terminal Tower
Cleveland, Ohio 44113 (216) 781-1212
-- and --
E. BEN FRANKS
DAVID G. PAUL
Franks & Grimes, L.L.P., 8 Woodmont Crossing
Texarkana, Texas 75503 (903) 792-3117

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. AN APPELLATE COURT'S UNQUESTIONED POWER TO CORRECT CLEAR LEGAL ERRORS *SUA SPONTE* IS IRRELEVANT TO WHETHER A LEGAL AND FACTUAL ANALYSIS UNDER *FIRESTONE V. BRUCH* SHOULD BE CONDUCTED FOR THE FIRST TIME ON APPEAL WITHOUT THE BENEFIT OF RECORD TESTIMONY BELOW 1

II. A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS AS TO THE APPLICATION OF THE *FIRESTONE* ABUSE OF DISCRETION STANDARD. 6

III. THE DISTRICT COURT'S DECISION ON RESPONDENTS' INTERFERENCE WITH THE PLAN'S SUBROGATION RIGHTS WAS EXPLICITLY BASED ON FEDERAL COMMON LAW. 8

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Arcadia, Ohio v. Ohio Power Co.,
498 U.S. 73 (1990) 1, 2, 3, 6

Cutting v. Jerome Foods, Inc., 993 F.2d 1293
(7th Cir. 1993) 7, 8

Firestone Tire and Rubber Co. v. Bruch,
489 U.S. 101 (1989) 1, 2, 3, 4, 5, 6

Hormel v. Helvering, 312 U.S. 552, 85 L.Ed. 1037,
61 S.Ct. 719 (1941) 2

Kamen v. Kemper Financial Services, Inc.,
500 U.S. 90 (1991) 1, 2, 3

Lebron v. National R.R. Passenger Corp.,
115 S.Ct. 961 (1995). 2

Pacificare, Inc. v. Martin, 34 F.3d 834 (9th Cir. 1994) 9

Provident Life and Acc. Ins. Co. v. Waller,
906 F.2d 985 (4th Cir. 1990)
cert. denied, 498 U.S. 982 (1990) 6, 8, 9, 10

Singleton V. Wulff, 428 U.S. 106, 49 L.Ed.2d 826,
96 S.Ct. 2868 (1976) 2, 3, 4, 6

Page

Turner v. City of Memphis, 369 U.S. 350, 7 L.Ed.2d 762, 82 S.Ct. 805 (1962) 2, 3

U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc. 113 S.Ct. 2173, 2177-79 (1993) 2, 3

CASE NO. 95-139

==========

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

==========

REPLY BRIEF OF PETITIONER

==========

INTRODUCTION

Despite Respondents' extensive reliance on *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) this case is not about an appellate court's unquestioned power, under certain circumstances, to correct legal errors *sua sponte*. This case is about whether the limited circumstances under which an appellate court can consider an issue for the first time on appeal includes conducting a *Firestone v. Bruch* abuse of discretion analysis where doing so requires further findings of fact and denies the Plan Administrator the opportunity to introduce testimony to defend the reasonableness of his interpretation. The Eighth Circuit has done this and, in the process, applied *Firestone* in a manner inconsistent with other circuits , i.e., not giving the required deference to the Plan Administrator's interpretation, while at the same time disregarding the District Court's attempt under federal common law to protect the Plan's subrogation rights from a conspiracy between a plan participant and a third party's insurer.

I. AN APPELLATE COURT'S UNQUESTIONED POWER TO CORRECT CLEAR LEGAL ERRORS *SUA SPONTE* IS IRRELEVANT TO WHETHER A LEGAL AND FACTUAL ANALYSIS UNDER *FIRESTONE V. BRUCH* SHOULD BE CONDUCTED FOR THE FIRST TIME ON APPEAL WITHOUT THE BENEFIT OF RECORD TESTIMONY BELOW.

Respondents St. Paul and Pillsbury spend nearly half of their legal argument purporting to address Cooper's claim that a *Firestone v. Bruch* abuse of discretion analysis of an ERISA plan interpretation should not be conducted for the first time on appeal. In doing so, Respondents cite no comparable Court of Appeals case where a *Firestone v. Bruch* analysis has been conducted (a) for the first time on appeal or (b) on such a sparse record below containing only a few potentially relevant documents and no testimony on the abuse of discretion issue. Instead, Respondents cite to several recent Supreme Court decisions for the proposition that an appellate court may *sua sponte* correct clear legal error which is "ultimately dispositive of the dispute before it." *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99-100 (1991); *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.* 113 S.Ct. 2173, 2177-79 (1993); and *Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 966 (1995). Respondents further claim that the Eighth Circuit decided this case in "implicit reliance on the *Arcadia* line of cases" (St. Paul Brief at page 24).

Respondents miss the ball. Cooper has not challenged an appellate court's unquestioned authority, under certain circumstances, to correct clear legal error. The "*Arcadia* line of cases" is nothing new. *See, e.g., Hormel v. Helvering*, 312 U.S. 552, 556, 85 L.Ed. 1037, 61 S.Ct. 719 (1941); *Turner v. City of Memphis*, 369 U.S. 350, 7 L.Ed.2d 762, 82 S.Ct. 805 (1962); and *Singleton V. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976). Moreover, the Eighth Circuit in the *Cooper* case did not and could not have relied on *Arcadia* or any of its predecessors because all of those cases involved *pure legal issues* and not the mixed questions of law and fact presented by a *Firestone v. Bruch* abuse of discretion analysis.

Arcadia may be "of a piece with the *Singleton* decision" as Respondents claim (St. Paul Br. at page 24) but reliance on *Arcadia* will not let them off the hook of applying the two tests suggested by a *Singleton* analysis. While it is correct that *Singleton* "announce(d) no general rule," it set forth two specific "circumstances in which a federal appellate court is justified in resolving an issue not passed on below": (1) "where the proper resolution is beyond any doubt" citing *Turner v. City of Memphis* and (2) "where injustice might otherwise result" citing *Hormel*.

Respondents make no effort to justify the Eighth Circuit's decision under either test. Yet *Arcadia*, *Kamen*, and *U.S. National Bank of Oregon* are no different from *Turner v. Memphis* where the court corrected a clear legal error below. What Cooper submits in this case - and Respondents do not address - is that the *Firestone v. Bruch* abuse of discretion analysis conducted by the Eighth Circuit for the first time on appeal clearly does not meet "the proper resolution beyond any doubt" standard of *Singleton* and *Turner*. The reasons why are found in *Hormel* and *Singleton* because additional facts developed in an evidentiary hearing could have changed the outcome in those cases. Such is not true of *Turner*, *Arcadia*, *Kamen*, or *U.S. National Bank of Oregon*. In *Hormel*, the Court said that a hearing was:

> essential in order that parties may have the opportunity to offer all the evidence they believe relevant [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. 312 U.S. at 556.

This is reemphasized in *Singleton*:

> We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. 428 U.S. at 120.

Viewed in the light of these two cases, Respondent St. Paul's claim at pages 22 and 23 of its Brief that "the Eighth Circuit acted on a sufficient record" is a joke. Indeed, the Court of Appeals in this case explicitly acknowledged that the record upon which it was applying the *Firestone* standard was a limited one (App. p. 15). Hence, while *some* facts relevant to a *Firestone* analysis were in the record before the Court of Appeals, clearly, not *all* relevant facts were. And certainly not *all* the facts that Cooper could have brought forth in its favor are in the record precisely because Cooper's interpretation of its reasonableness of the subrogation rights under the Plan was never at issue in the court below.

One of the further findings of fact which the Court of Appeals made as part of its *Firestone* analysis was that Cooper had a past practice of interpreting its subrogation rights "broadly to apply to all claims against a party liable for medical expenses" (*See* App. p. 14). There was no testimony in the District Court on this fact, so the Court of Appeals based its finding on "Cooper Tire's arguments on appeal" on other issues. Another of the further findings of fact was that Cooper had "interpreted the subrogation provision inconsistently". Again, there was no testimony on this in the District Court. Instead, the Appellate Court merely referred to a 1980 form letter to Maza which quotes verbatim the Plan subrogation language. What is missing from the record, because the issue was never raised, is evidence concerning Cooper's treatment of other employees who signed a subrogation agreement

like the one that Maza signed and whether Cooper ever sought to receive more than mere reimbursement from any of them.

What the Court of Appeals ignored and what St. Paul and Dr. Pillsbury would have this court ignore is the fact that the Plan specifically says that Cooper may "reasonably request" the participants to execute any instruments it deems necessary "to facilitate enforcement of the Company's subrogation rights" and that participants shall take "no action prejudicing" the Company's subrogation rights. The Plan itself is silent as to exactly how Cooper intends to enforce its reimbursement right and what actions by a participant would be deemed prejudicial. But Cooper was never given an opportunity to introduce testimony and evidence as to why it considers the subrogation agreement to be reasonable and necessary to enforce its subrogation rights. Moreover, Cooper was given no opportunity to show what it has done in the past to enforce its subrogation rights. And Cooper was never given an opportunity to show how it has exercised its right to consent to settlements of all claims in the past.

When the reasonableness of a Plan Administrator's interpretation of its rights under the Plan is going to be reviewed under the *Firestone* standard, the Plan Administrator should be given both the notice *and* the opportunity to present all evidence -- not just some evidence -- that may be relevant to consideration of the reasonableness of its actions. It is obvious that such evidence will be lacking and that the record will not be complete if a *Firestone* analysis is raised and decided by the Court of Appeals for the first time on appeal.

Finally, none of the new Supreme Court cases cited by Respondent on this issue nor the circuit court cases cited by Cooper at page 28 of its brief turn upon the point cited by

Respondents St. Paul and Pillsbury at page 25 of their brief, *i.e.*, that considering an issue for the first time on appeal depends on whether the issue is raised *sua sponte* or raised by a party. All of the decisions of the Supreme Court and the U.S. Courts of Appeals cited by the parties only permit considering an issue for the first time on appeal if it raises a purely legal issue. *There are no cases which permit doing so where further findings of fact would be required* regardless of who first raises the issue.

For these reasons, Cooper submits that *Arcadia* does not trump *Singleton* which continues to require a reversal of the Court of Appeals' decision in this case or, alternatively, a remand to the District Court for a full evidentiary hearing.

II. A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS AS TO THE APPLICATION OF THE *FIRESTONE* ABUSE OF DISCRETION STANDARD.

Despite their efforts to the contrary, the Respondents merely highlight the conflict which exists between the Circuits as to the application of the abuse of discretion standard required by *Firestone*. Cooper agrees that the Appellate Courts all pay lip service to the abuse of discretion standard. However, the application of this standard through the multi-part tests developed by the Fourth, Eighth, and Eleventh Circuits erode the discretion granted by *Firestone*. A simple comparison of *Firestone's de novo* standard (where the administrator has no discretion) and the Fourth and Eighth Circuit tests bears out the diminished discretion allowed by these tests. The *de novo* standard emphasized that such a review would be made "by looking to the terms of the plan and other manifestations of the parties' intent." 489 U.S. at 412-13. By the same token, the factors utilized by the Fourth and Eighth Circuit under the abuse of discretion standard expressly sanctions

a review based on the terms of the plan and the parties intent. Hence, the Fourth and Eighth Circuit's "abuse of discretion" tests are nothing more than a hidden *de novo* review. That it happened in this case is clear. The Eighth Circuit openly admitted at footnote 10 of its decision that it could harmoniously construe the Plan instrument and the Subrogation Agreement developed by the Plan but chose not to do so (App. p. 14).

Cutting v. Jerome Foods, Inc., 993 F.2d 1293 (7th Cir. 1993), continues to be a perfect illustration of the conflict. Contrary to Respondent's claims, the subrogation language of both Cooper's and *Jerome's* plans is virtually identical. In *Jerome Foods*, the plan stated the employee:

> agrees that the Plan shall be subrogated to all claims, demands, actions and rights of recovery of the individual against any third party or any insurer, including Workers' Compensation, to the extent of any and all payments made or to be made hereunder by the Plan.

993 F.2d at 1295.

Similarly, Cooper's plan states that upon payment of all or a portion of a covered service or drug, Cooper will succeed

> to any rights of recovery the Employee or dependent may have or acquire (with respect to such service or prescription drug) against any person or organization except insurers of individual hospital, surgical, or medical policies issued to the Employee or dependant. *Salaried*

Employees Welfare Benefits Plan of Cooper Tire & Rubber Company, (A. 86A).

No substantive difference exists between the language of these two plans. Despite the nearly identical language, the Eighth and the Seventh Circuits do not come to the same conclusion solely because of the erroneous *Firestone* test utilized by the Eighth Circuit. This is not consistent with the development of a uniform body of law under ERISA envisioned by Congress or this Court. Far from a uniform enforcement policy, allowing these differing standards of review in *Jerome Foods* and *Cooper* to co-exist will lead to a sea of confusion upon which administrators, employees, and beneficiaries will find themselves afloat. Only by granting certiorari can this Court correct this inequitable situation, thereby allowing all parties to understand and enforce their respective rights.

III. THE DISTRICT COURT'S DECISION ON RESPONDENTS' INTERFERENCE WITH THE PLAN'S SUBROGATION RIGHTS WAS EXPLICITLY BASED ON FEDERAL COMMON LAW.

Both Maza, St. Paul and Pillsbury are wrong when they advance the new argument that the issue of unjust enrichment under federal common law was not considered by the court below. The trial court specifically grounded its decision in Cooper's favor on *Provident Life and Acc. Ins. Co. v. Waller* [App. p. 32] 906 F.2d 985 (4th Cir. 1990) *cert. denied*, 498 U.S. 982 (1990) and the federal common law. Specifically, the second paragraph of the trial court's Findings of Fact and Conclusions of Law states as follows:

> Where federal case law does not deal with a dispute arising under a given issue, the court must develop federal common law, and will look to the plan contract itself, the statutory policies of ERISA and state law. *Provident Life and Acc. Ins. Co. v. Waller* [App. p. 32] 906 F.2d 985, 993 (4th Cir. 1990) *cert. denied*, 498 U.S. 982 (1990).

Despite this explicit wording, however, both Maza and St. Paul urgently argue, for different reasons, that the District Court did not find that Cooper had a common law right to restitution of the monies it advanced to Maza for his wife's medical expenses.

Maza argues that the District Court *really* found that Cooper only had a *statutory* right to appropriate equitable relief under Section 1132(a)(3)(B), such as restitution for unjust enrichment. Maza then argues that *Provident* and *Pacificare, Inc. v. Martin*, 34 F.3d 834 (9th Cir. 1994), are consistent with each other because each stands for the proposition that an action for restitution for unjust enrichment is a statutory right under ERISA. *See* Maza Brief at p. 3. What Maza cannot get around, however, is that the Fourth Circuit in *Provident* explicitly chose *not* to address the statutory claim and merely referenced the *possibility* of same in a footnote, a footnote not cited by the District Court in this case.

St. Paul and Dr. Pillsbury, on the other hand, correctly concede that the trial court in this case cited *Provident* for purposes of applying common law, not statutory law. But they incredibly contend that the trial court "only considered the federal common law...while resolving Dr. Pillsbury's and St. Paul's estoppel defense to Cooper Tire's suit." *See* St. Paul Brief at p. 10. There is nothing in the Court's Findings of Fact and Conclusions of Law

to warrant their assertion. The Court cited *Provident* in the second paragraph of its Findings of Fact and Conclusions of Law and spent 15 pages discussing the substantive merits of Cooper's claim *not* the Respondents' forlorn estoppel defense which it cursorily dismissed in paragraph 17, taking less than a page.

CONCLUSION

For the foregoing reasons, Cooper respectfully requests that the Writ of Certiorari be granted or that this case be remanded to the District Court for a full evidentiary hearing on the record.

Respectfully submitted,

Michael T. McMenamin
Counsel of Record

E. Ben Franks
David G. Paul
Franks & Grimes, L.L.P.
8 Woodmont Crossing
Texarkana, TX 75503

Nancy A. Noall
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH 44113